IN THE

# Supreme Court of the United States

**October Term, 1976**

**No. 76-114**

JOSE SANTIAGO,

*Petitioner,*

*v.*

SUPREME COURT OF THE STATE OF NEW YORK, KINGS COUNTY, and BENJAMIN J. MALCOLM, Commissioner, New York City Department of Correction,

*Respondents.*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

EUGENE GOLD
District Attorney, Kings County
*Attorney for Respondent*
400 Municipal Building
Brooklyn, New York 11201
(212) 643-5100

ELLIOTT SCHULDER
*Assistant District Attorney*
*Of Counsel*

IN THE

# Supreme Court of the United States

**October Term, 1976**

**No. 76-114**

---

JOSE SANTIAGO,

*Petitioner,*

*v.*

SUPREME COURT OF THE STATE OF NEW YORK, KINGS COUNTY, AND BENJAMIN J. MALCOLM, COMMISSIONER, NEW YORK CITY DEPARTMENT OF CORRECTION,

*Respondents.*

---

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

---

### Opinions Below

The opinion of the Supreme Court of the State of New York, Appellate Division, Second Judicial Department (Petitioner's Appendix "E"), is reported at 49 App. Div. 2d 928, 374 N.Y.S. 2d 40 (2d Dept. 1975). The Memorandum and Order of the United States District Court for the Eastern District of New York (Petitioner's Appendix "F"), and the Amendment to Memorandum and Order dated March 10, 1976 and Memorandum and Order Denying Application for Certificate of Probable Cause (Petitioner's Appendix "G"), are reported at 411 F. Supp. 73 (E.D.N.Y. 1976).

## Questions Presented

1. Whether the Supreme Court possesses jurisdiction to issue a writ of certiorari to the Court of Appeals to review the denial of a motion for a certificate of probable cause.

2. Whether a state prisoner who has been afforded by the state courts the opportunity for full and fair litigation of a Fourth Amendment claim may advance his claim again on federal habeas corpus review.

3. Whether the police officer's affidavit furnished probable cause for the issuance of the instant search warrant.

## Statement of the Case

Petitioner was indicted by a Kings County, New York, grand jury for the crimes of Promoting Gambling in the First Degree, Possession of Gambling Records in the First Degree, Criminal Possession of Forged Instruments in the Second Degree, and Possession of Weapons and Dangerous Instruments and Appliances, as a felony (in one count) and as a misdemeanor (in another count).

The charges stemmed from the seizure of certain property by police officers while executing a search warrant* on May 26, 1972, inside apartment 4B at 152-29th Street, Brooklyn, New York.

Pursuant to Petitioner's motion to controvert the search warrant and to suppress the evidence seized, a hearing was held on January 3, 1974, in the Supreme Court of the State of New York, Kings County, before Hon. William T. Cowin.

* The search warrant, the supporting affidavit and the return are contained in Petitioner's Appendices "A", "B" and "C", respectively.



Subsequent to the conclusion of the hearing, Petitioner's motion was denied by Justice Cowin in a written opinion (Petitioner's Appendix "D"). Thereafter, on April 5, 1974, Petitioner pleaded guilty to the crime of possession of a weapon as a felony, and he was sentenced, on May 23, 1974, to imprisonment for a term of six months. Execution of sentence was stayed pending appeal, and Petitioner remains free on $5,000.00 bail, upon Respondents' consent, pending disposition of the within petition.

Petitioner appealed the above judgment of conviction to the Supreme Court of the State of New York, Appellate Division, Second Judicial Department. The primary contention raised by Petitioner concerned the sufficiency of the affidavit underlying the search warrant. Petitioner also asserted that the Trial Court improperly considered the hearing testimony in reaching the conclusion that the search warrant was issued upon probable cause. In response to the latter claim, the District Attorney concurred that the propriety of the search could be tested solely on the sufficiency of the supporting affidavit. In unanimously affirming the judgment of conviction, the Appellate Division found the affidavit alone sufficient to establish probable cause (Petitioner's Appendix "E").

Petitioner's application for leave to appeal to the New York Court of Appeals was denied by Hon. Charles D. Breitel, Chief Judge of that court, on November 11, 1975.

Petitioner next applied to the United States District Court for the Eastern District of New York for a writ of habeas corpus. After hearing argument, Hon. Thomas C. Platt denied Petitioner's application in a Memorandum and Order issued on March 10, 1976 (Petitioner's Appendix "F").

On March 29, 1976, the District Court denied Petitioner's application for a certificate of probable cause, sought pursuant to 28 U.S.C. § 2253, and F.R.A.P. Rule 22(b) to permit Petitioner to appeal to the United States Court of Appeals from the District Court's order denying his application for a writ of habeas corpus (Petitioner's Appendix "G").

On April 28, 1976, Petitioner's further application for a certificate of probable cause was denied by the United States Court of Appeals for the Second Circuit (Petitioner's Appendix "H").

## REASONS FOR DENYING THE WRIT

### POINT I

**The Supreme Court is without jurisdiction to issue a Writ of Certiorari to the Court of Appeals to review the denial of a motion for a Certificate of Probable Cause.**

Although learned counsel for Petitioner has neglected to address the issue, a serious question exists, in our view, whether this Court possesses the requisite jurisdiction to issue a writ of certiorari under the present circumstances.

The statute upon which Petitioner relies to invoke the jurisdiction of this Court provides that a writ of certiorari may be issued by the Supreme Court in order to review "[c]ases in the courts of appeals", 28 U.S.C. § 1254. Clearly, this case was never "in" the Court of Appeals, within the meaning of the statute, for want of a certificate of probable cause. Hence, a writ of certiorari cannot be issued herein. See, *House* v. *Mayo,* 324 U.S. 42, 44 (1945).

While, in the *House* case, this Court assumed jurisdiction, by way of certiorari, pursuant to former 28 U.S.C.



§ 377 (currently 28 U.S.C. § 1651 [a]), it is our respectful submission that such a patently circular approach should not be followed in the instant matter. It should be noted that 28 U.S.C. § 1651(a) does not expand the jurisdiction of the Supreme Court; rather, the statute merely grants the Court the authority to issue all writs necessary to carry out its already existing jurisdiction. Since, as argued above, the requisite jurisdiction to issue a writ of certiorari is absent under 28 U.S.C. § 1254(1), it is similarly non-existent under 28 U.S.C. § 1651(a). In any event, we note that Petitioner does not even seek to rely on the latter statute, and, therefore, he should not be entitled to its benefit.

Moreover, the determination of the Court of Appeals to deny Petitioner's application for a certificate of probable cause was well within the limits of that court's discretion and should not be subject to review. As this Court declared in a different context in *In Re Burwell,* 350 U.S. 521, 522 (1956):

> It is not for [the Supreme] Court to prescribe how the discretion vested in a Court of Appeals, acting under 28 U.S.C. § 2253 [providing for certificates of probable cause], should be exercised, [citation omitted]. As long as that court keeps within the bounds of judicial discretion, its action is not reviewable.

### POINT II

**Where a state prisoner has been afforded an opportunity for full and fair litigation of a Fourth Amendment claim, he may not advance his claim again in a Federal Habeas Corpus Proceeding.**

Even assuming that jurisdiction exists for the issuance of a writ of certiorari to the Court of Appeals, by seeking

review of a federal habeas application which raised a Fourth Amendment claim previously litigated in the state courts, Petitioner seemingly has ignored the recent mandate of this Court foreclosing such review.

In *Stone* v. *Powell,* and *Wolff* v. *Rice,* U.S. , 96 S.Ct. , 44 U.S.L.W. 5313 (decided July 6, 1976), it was held that federal habeas corpus relief is not available to state prisoners attempting to raise Fourth Amendment claims which have received full and fair consideration in the state courts.

The case at bar unquestionably comes within the holding of the above-cited cases. Here, as in *Wolff* v. *Rice, supra,* the state prisoner's detention emanated from the seizure of certain property pursuant to a search warrant.* Furthermore, the validity of the search and seizure effectuated herein was fully and fairly determined, in the state appellate court, solely on the sufficiency of the warrant (See Petitioner's Appendix "E").**

Consequently, it is respectfully submitted that the ruling in *Stone* v. *Powell* and *Wolff* v. *Rice* compels a similar result herein.

## POINT III

**The Supporting Affidavit provided probable cause for the issuance of the search warrant.**

Turning to the merits of the Petition, this case does not present a substantial issue worthy of this Court's review, as the information in the police officer's affidavit (Petitioner's Appendix "B") established probable cause for a residential search.

---

* As Mr. Chief Justice Burger noted in his concurring opinion, "[T]he 'sanction' [imposed by the exclusionary rule] is particularly indirect when . . . the police go before a magistrate, who issues a warrant." 44 U.S.L.W. at 5322.

** Since the state appellate court made its determination on the basis of the warrant alone, it is immaterial whether the Trial Court may have considered the hearing testimony together with the affidavit in concluding that probable cause existed, as Petitioner claims on page 3 of his Petition.



Petitioner was observed by the officer on four proximate dates engaging, on a regular, ongoing basis, in what can only be described as "typical gambling activities." See, *People* v. *Valentine,* 17 N.Y. 2d 128, 269 N.Y.S. 2d 111, 216 N.E. 2d 321 (1967). Accordingly, there is no dispute between the parties concerning the fact that probable cause existed to believe that Petitioner was violating the state gambling laws.

The essential issue presented is whether a sufficient nexus was established between Petitioner's gambling operation and the subject premises. In this regard, Petitioner was seen on one date returning to the premises at 152-29th Street after engaging in a gambling transaction. The officer had previously observed Petitioner entering apartment 4B in the said premises. On other occasions, Petitioner's automobile had been observed parked in the vicinity of the said premises after similar gambling transactions had taken place. Furthermore, on still another date, Petitioner had been seen, during the hours in which such transactions regularly occurred, leaving apartment 4B at the said premises, and later returning to the apartment to be met by a known participant in the gambling activity. Clearly, the affidavit supplied sufficient facts "to warrant a man of reasonable caution to believe that the articles sought" [i.e., evidence of Petitioner's gambling enterprise] could be found at the premises. *United States* v. *Rahn,* 511 F.2d 290, 293 (10th Cir.), *cert. denied* 423 U.S. 825 (1975).

It is noteworthy that, in numerous cases, the courts have upheld warrant-authorized searches although the nexus between the illegal conduct and the places searched rested, not solely upon direct observation of criminal activity occurring on the premises, but on various other relevant considerations. Among the factors placed in the probable cause balance are the nature of the crime, the suspect's

degree of involvement in the criminal enterprise, the place of occurrence (either in or near the residence to be searched), the suspect's movements after the commission of the crime, the extent of opportunity for concealment, and normal inferences to be drawn as to where a criminal would be likely to conceal the items sought. See, *United States v. Lucarz,* 430 F.2d 1051, 1055 (9th Cir. 1970); *United States* v. *Mulligan,* 488 F.2d 732 (9th Cir. 1973), *cert. denied* 417 U.S. 930 (1974); *United States v. Teller,* 412 F.2d 374 (7th Cir. 1969), *cert. denied* 402 U.S. 949 (1971); *Porter v. United States,* 335 F.2d 602 (9th Cir. 1964), *cert. denied* 379 U.S. 983 (1965). When these factors are applied to the circumstances at bar, Petitioner's deep involvement in the gambling enterprise, and his pattern of movement to and from the subject premises establish an undisputable connection between the criminal activity and the place to be searched.

This case is very similar, on its facts, to *People* v. *Coscia,* 26 App. Div. 2d 649, 272 N.Y.S. 2d 416 (2d Dept. 1966), where the court upheld a warrant authorizing a residence search based upon a police officer's observations of the defendant engaging in gambling activities (almost identical to those of Petitioner), after which the defendant returned to his residence. Five minutes later, an unknown male met the defendant at the latter's house and received from him a packet of paper. Even though there was no evidence connecting the packet to the earlier gambling activities, the court held that the defendant's criminal conduct had extended to his home. Similarly, in the instant matter, Petitioner was traced back to the premises after one gambling transaction. His automobile was seen in the vicinity of the premises on three other occasions after the completion of similar transactions. He was known to frequent the subject apartment and was followed into said



apartment on one occasion by a known participant in the gambling activity, who as the District Court found, remained in the apartment for a sufficient length of time (five minutes) to have conducted a gambling transaction.

Petitioner's reliance on *United States* v. *Price,* 149 F. Supp. 707 (D.C.D.C. 1957) is misplaced. There, no direct connection was shown between the premises to be searched and the gambling activity. Here, as previously noted, such direct connection was clearly established.

To conclude, when tested in a realistic and common-sense manner, the officer's affidavit provided probable cause to believe that evidence of Petitioner's gambling activities was being concealed in the subject premises.

## CONCLUSION

**The petition for a writ of certiorari should be denied.**

Dated: Brooklyn, New York
August, 1976

Respectfully submitted,

EUGENE GOLD
*District Attorney*
*Kings County*

ELLIOTT SCHULDER
*Assistant District Attorney*
*of Counsel*